IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Champalal Vs. The State of Rajasthan
(D.B. CRIMINAL APPEAL NO.639/2000)

D.B. Criminal Appeal under Section 374(2) Cr.P.C. against the judgment dt.12.10.2000 passed by the Additional Sessions Judge, Sojat Camp Jaitaran, District, Pali in Sessions Case No.42/1999.

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Date of Judgment: September 14, 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.J.S.choudhary)
Mr.Pradeep Choudhary), for the appellant

Mr.O.P.Rathi, Public Prosecutor

REPORTABLE/-

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. The appellant Champalal has been convicted of offence under Section 302 I.P.C. on the charge of murder of Babu Khan by the judgment of the Additional Sessions Judge, Sojat Camp Jaitaran, District, Pali dated 12.10.2000 and sentenced to imprisonment for life and to pay a fine of Rs.2000/-; in default of payment to further undergo two months' rigorous imprisonment. He has also been convicted of offence

under Section 449 I.P.C. and sentenced to five years' rigorous imprisonment and to pay a fine of Rs.500/-; in default of payment to further undergo one month's rigorous imprisonment. He has further been convicted of offence under Section 435 I.P.C. and sentenced to five years' rigorous imprisonment and to pay a fine of Rs.500/-; in default of payment to further undergo one month's rigorous imprisonment.

2. The picture, which has been projected from eye-witness account, is that on 5th March, 1999 at about 10.30 A.M. While deceased Babu Khan, his wife P.W.11 Memuna and son Habid were sitting in the house, the appellant Champalal arrived carrying petrol in a plastic bottle in hand. He asked deceased Babu Khan to accompany him to Badiya Hynda Bhata for compromise with P.W.6 Mangilal. The refusal of the deceased Babu Khan, infuriated the appellant, he sprinkled petrol on him and lit a match setting him aflame. Babu Khan received extensive burn injuries on various parts of his body. The police recorded his statement. On the basis of the said statement, a case was registered for offence under Section 452,307,429 and 323 I.P.C. After usual investigation police laid charge-sheet against the

appellant for the said charges.

3. The appellant denied the charges levelled against him and claimed trial. The prosecution adduced oral and documentary evidence to prove its case. The appellant in his statement under Section 313 of the Code of Criminal Procedure denied the correctness of the prosecution case appearing against him and pleaded innocent. The trial court having found the prosecution case proved convicted and sentenced the appellant in the manner stated above.

4. Assailing the conviction it is contended by the learned counsel that the trial court has committed gross illegality in relying on the oral dying declaration, which suffers from serious infirmities. It is also submitted that the entire case rests on the sole testimony of P.W.11 Memuna, who is highly interested and partisan witness. In alternate it is submitted that the case against the appellant does not travel beyond offence under Section 304 Part-II I.P.C. On the other hand learned Public Prosecutor has supported the prosecution case.

5. We have scanned, scrutinized and analysed the

prosecution evidence exhaustively and considered the rival contentions. The fact of deceased Babu Khan meeting homicidal death is proved by the statement of P.W.10 Dr.Sumer Chand Jain beyond doubt. He conducted autopsy on the dead body of Babu Khan vide Ex.P15. In his opinion the cause of death was shock due to antemortem extensive burns. It will be relevant to state that on the date of occurrence the injuries of deceased Babu Khan were examined by P.W.9 Dr.Laxmi Kant vide Ex.P13. He noticed extensive burns on his body. He also examined the injuries on the person of P.W.11 Memuna vide Ex.P14.

6. The prosecution in order to establish the charge against the appellant has produced evidence of dying declaration and witnesses of occurrence. As far as oral dying declaration is concerned, P.W.13 Man Singh , A.S.I., Police Station, Sojat City deposed that on 5.3.99 he received a telephonic message from the hospital to the effect that a person has been admitted in seriously burnt condition. He reached to the Hospital and recorded his statement vide Ex.P10. As per the version of the incident given by the injured Babu Khan, while he was sitting at his house with his wife, the appellant

Champalal arrived and asked him to accompany him to a place known as Badiya Hynda Bhata for compromise with Mangilal. He expressed his inability to accompany him. This infuriated him and he poured petrol and put him to fire. He had carried with him petrol in a plastic bottle. In the incident his wife also sustained burn injuries and a she-goat died of burning. His neighbours Mst.Raju and Chandra also arrived. On the basis of the said report, he registered the First Information Report. The criticism against the said oral dying declaration is that irrespective of the fact that doctors were available in the hospital the Police Officer did not bother to obtain a certificate as to the mental and physical fitness of the deceased. Thus, it cannot be said that he was in fit condition to give statement.

7. An oral dying declaration recorded by the police can be relied upon subject to certain pre-requisite conditions. One of the essential condition is the situation as to the fitness of the person to make a statement. We have carefully gone through the statement of P.W.13 Man Singh. What to talk of a certificate from the doctor, the witness himself has not recorded satisfaction of any sort as to the fitness of the

injured to give the statement. In absence of a statement of fact in that regard, it is not warranted for supposing that the injured must be in a fit condition to give the statement. In this view of the matter, we do not consider it safe to place reliance on the dying declaration Ex.P10 as recorded by the A.S.I., Police Station, Sojat City namely P.W.13 Man Singh.

8. Reverting to the ocular evidence, P.W.11 Mst. Memuna is the wife of deceased Babu Khan. She deposed that on the date of occurrence, she was sitting in her house along with her husband and the children. At that time appellant Champalal arrived and asked her husband to accompany to him Badiya for settling the matter with Mangilal. Her husband refused to accompany him. The appellant had carried with him a plastic bottle of petrol. He poured the same on her husband, lit match and put him to flames. He raised hue and cry. She poured water to extinguish the fire. She also sustained burn injuries. A she-goat also sustained burn injuries. As a result of the injuries, she died on the spot. She also sustained burn injuries while rescuing her husband. The squall attracted her neighbours namely P.W.1 Smt.Raju, P.W.2 Smt.Chandra

and P.W.3 Smt.Mobina. Her husband received extensive burn injuries. He was immediately removed to the hospital where he succumbed to the injuries.. Nothing substantial has been elicited in the cross examination.

9. P.W.1 Smt.Raju is the neighbour as well as the sister of P.W.11 Memuna. She deposed that at the time of occurrence, she was sitting on a platform outside the house. She had seen the appellant Champalal entering in the house of deceased Babu Khan with a bottle of petrol in hand. The appellant asked Babu Khan to get the matter compromised with Mangilal. The deceased told that it was not possible to influence Mangilal as he was not of his caste. The appellant Champalal threatened Babu Khan but he did not agree to accompany him. The appellant out of anger poured the petrol on Babu Khan and put him to fire. She rushed and entered in the house of Babu Khan. She also helped other members of the family in rescuing Babu Khan. Nothing substantial has been elicited in the cross examination to discredit the testimony of this witness.

10. P.W.2 Smt.Chandra and P.W.3 Smt. Mobina have not supported the prosecution case and as such they

have been declared hostile. P.W.6 Mangilal has also not supported the prosecution case. As such he was also declared hostile.

11. The only criticism levelled against the testimony of P.W.11 Memuna is that she is highly interested witness being the wife of the deceased. It is well settled that merely because the witness is interested/related cannot be a ground to discredit the testimony of such witness, as it is normally expected that such a witness will not leave out the real culprit and rope in an innocent person. It is also well settled that the evidence of witnesses of occurrence cannot be thrown above board merely because they are interested and partisan witnesses. However, since both the witnesses of the occurrence are members of family of the deceased, we have scrutinized the evidence of such witness carefully.

12. On careful consideration of the witnesses, we feel that the presence of P.W.11 Memuna is quite natural. It is also evident from injury report Ex.P14 that she also sustained burn injuries. This confirms the presence of P.W.11 Memuna at the place of occurrence. There is no reason for her to falsely implicate the appellant

Champalal. There is neither any inconsistency or such improbability which may discredit the testimony of this witness. The statement of P.W.11 Memuna finds support from the statement of P.W.2 Smt.Raju. The statement of these witnesses is corroborated from the medical evidence. The witness has well stood the test of cross examination. Thus, the prosecution has succeeded in establishing its case against the appellant beyond any manner of doubt.

13. It is submitted by the learned counsel that the circumstances of the case indicate that the incident had taken place at the spur of moment. The act was not premeditated. As such the case against the appellant does not travel beyond offence under Section 304 Part-II I.P.C. He placed reliance on a decision of the Apex Court in **Sree Vijaykumar & Anr. vs. State, by Inspector of Police Kanyakumari** reported in 2005 SCC(Cri) 1896. The prayer is opposed by the learned Public Prosecutor.

14. In the instant case the version of the prosecution is that the appellant went to the house of deceased Babu Khan with a bottle of petrol in hand for taking him

to the house of Mangilal for settling the dispute with him. It is difficult to comprehend that a person approaching another person for help will go carrying a bottle of petrol with intention to pour the same on such person and put him to flames. The facts of the case indicate that it was a random act resorted by the appellant at the spur of moment. It was not a pre-planned act with the definite intention of causing death. As observed by the Apex Court in Sree Vijaykumar's case(supra), it was a dangerous act likely to cause fire but it was not a case leading to inference that he intended to commit the murder. Thus, the act of the appellant would give rise to an offence of culpable homicide not amounting to murder punishable under Part-II of Section 304 I.P.C. Thus, the appellant is liable to be convicted of offence under Section 304 Part-II I.P.C. instead of Section 302 I.P.C.

15. Consequently, the appeal is partly allowed. The appellant Champalal S/o Mula Ram is convicted of offence under Section 304 Part-II I.P.C. instead of 302 I.P.C. It is reported that he is in Jail since March, 1999. Thus, he has undergone substantive sentence of more than seven years. The end of justice would meet if the

sentence is reduced to the period already undergone. The conviction and sentence for the cognate offences is maintained. The appellant is in Jail. He shall be released forthwith, if not required in any other case.

(R.P. VYAS), J. **(N.N.MATHUR), J.**

BKS/-